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Supreme Court of the United States.

OCTOBER TERM, 1974.

No. .

HANS PEYMANN,
PETITIONER,

v.

PERINI CORPORATION,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner, Hans Peymann, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review the judgment of that court entered on November 22, 1974, in the above-entitled action. Judgment was entered on November 22, 1974, pursuant to an opinion affirming the actions of the trial court and a copy of said judgment is appended hereto as Appendix B. The said judgment has been docketed on the official record of the United States Court of Appeals for the First Circuit and a copy of said docket containing those entries is appended hereto as Appendix E.

I.

Opinion Below.

The opinion of November 22, 1974, of the United States Court of Appeals for the First Circuit does not yet appear in the official reporter. It is contained in the official record of said court and a copy of said opinion is appended hereto as Appendix A.

II.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit now sought to be reviewed was entered on November 22, 1974. Entry was made pursuant to an order dated that same day. Therefore, this petition falls within the time prescriptions of Title 28 of the United States Code, § 2101.

Jurisdiction to review the aforesaid proceedings exists by virtue of Title 28 of the United States Code, § 1254.

III.

Questions Presented.

A. Is the "*Walker* doctrine," enunciated in the case of *Walker* v. *Lykes Bros. S.S. Co.*, 193 F. 2d 772 (2d Cir. 1952), tantamount to a reassertion of the defense of assumption of risk and therefore violative of 45 U.S.C. § 54 (1970) and case law construing said statute?

B. Whether the Court of Appeals for the First Circuit erred in ruling that proof of unseaworthiness was a necessary element of the claim for negligence under the Jones Act?

IV.

Statutes Involved.

The case involves the following statutes:

45 U.S.C. § 54 (1970).

Assumption of Risks of Employment.

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

46 U.S.C. § 688 (1970).

Recovery for Injury to or Death of Seaman.

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the

United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

V.

Statement of Facts.

The petitioner, Hans Peymann, a 58-year-old seaman at the time of his injury, was a member of the crew of the Tugboat "Gorham Whitney." The vessel is and was owned, operated and controlled by the Perini Corporation. The petitioner was licensed by the United States Coast Guard as a marine engineer and was so employed by the respondent.

On or about April 10, 1968, the Whitney was tied up in the Perini yard in East Boston, Massachusetts, for the purpose of an overhaul of the vessel's engines. The work was being performed by Mr. Peymann, Chief Engineer, and Mr. Charles T. Mahoney, Assistant Engineer.

During the week immediately preceding April 10, 1968, the petitioner made several requests to the foreman, Mr. Fred Grover, for a third man to assist him and Mr. Mahoney in the engine overhaul. Although it was customary to perform the task with three men, each of the petitioner's requests were denied.

At about 10:30 a.m. on April 10, 1968, the petitioner and Mr. Mahoney were preparing to remove the cylinder heads on one of the vessel's engines. The process of removing the cylinder heads is effected by the use of a device called a "chain-fall," which is a chain and pulley device attached to a shackle in the deck immediately over-

head. In order to secure the chain-fall into position, it was necessary to use a ladder which was a usual piece of the vessel's equipment.

However, despite the usual presence of the ladder, and notwithstanding a diligent search for same, none could be found. As the work had to be done, the petitioner climbed upon the 3/4 inch pipe railing encircling the engine in order to attach the chain-fall to the shackle overhead.

Mr. Mahoney "pushed" the chain-fall up to the petitioner who was balanced upon the railing and the petitioner proceeded to hook it into the overhead shackle when he slipped and fell onto the grating of the engine room floor injuring his lower back.

After his fall, the petitioner noticed a film of oil on the railing from which he slipped and fell. He did not observe this film of oil prior to his fall. He testified that during an overhaul procedure oil was constantly dripping onto the surfaces below the raised cylinder heads. He further testified that, as Chief Engineer, his duties included maintaining the engine room.

VI.

History of Proceedings.

Subsequent to the injury, the petitioner commenced suit against the Perini Corporation, alleging causes of action under the Merchant Marine Act of 1920, 46 U.S.C. § 688 (1970) (hereinafter the Jones Act), and the General Maritime Law for unseaworthiness, maintenance and cure. Jurisdiction was founded on 46 U.S.C. § 688 (1970) and the case was tried in the United States District Court for the District of Massachusetts.

The trial judge directed a verdict for the respondent on the Jones Act count and the jury rendered a verdict

for the respondent on the count for unseaworthiness. The count for maintenance and cure is no longer in issue. The District Court entered judgment for the respondent on the two aforementioned counts.

The petitioner appealed the entry of the aforesaid judgment to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 1291 (1970). On November 22, 1974, said Court of Appeals affirmed the rulings of the District Court.

A petition for rehearing was filed with the United States Court of Appeals on December 9, 1974. Said petition was denied on December 24, 1974. The specific issue to which said petition was directed is not herein involved. However, in order to present this Honorable Court with copies of all decisions and judgments of the Court of Appeals regarding this case, a copy of the opinion of that court is appended hereto as Appendix C. A copy of the judgment entered pursuant to that opinion is appended hereto as Appendix D.

VII.

Considerations Governing Review on Certiorari.

The decision of the Court of Appeals for the First Circuit sought to be reviewed falls within the scope of Rule 19 of the Rules of the Supreme Court of the United States, and this petition should be allowed.

In particular, in following the doctrine enunciated in the case of *Walker* v. *Lykes Bros. S.S. Co.*, 193 F. 2d 772 (2d. Cir. 1952), the decision conflicts with the decisions of other Courts of Appeal, Federal District Courts, and State courts in the varying treatment of the *Walker* doctrine.

Some courts follow *Walker*,

See, e.g., Cooke v. *The M/V Wasaborg*, 189 F. Supp. 464 (D. Ore. 1960); *Elliott* v. *Jones & Laughlin Steel Corp.*, 166 F. Supp. 731 (W.D. Pa. 1957), aff'd mem. 259 F. 2d 959 (3d Cir. 1958); *Reinhart* v. *United States*, 457 F. 2d 151 (9th Cir. 1972).

Some courts decline to follow *Walker*,

See, e.g., Boat Dagny v. *Todd*, 224 F. 2d 208 (1st Cir. 1955); *Dunbar* v. *Henry Du Bois' Sons Co.*, 275 F. 2d 304 (2d Cir. 1960), cert. denied, 364 U.S. 815; *Chesapeake & Ohio Railway Co.* v. *Newman*, 243 F. 2d 804 (6th Cir. 1957); *Barrell* v. *Brown*, 495 P. 2d 733 (Ore. 1973); *Ktistakis* v. *United Cross Navigation Corp.*, 204 F. Supp. 293 (S.D. N.Y. 1962), affirmed on this issue, 316 F. 2d 869 (2d Cir. 1963).

And other courts have drawn fine distinctions to preclude the harsh results of *Walker*.

See, e.g., Mason v. *Lynch Brothers Co.*, 228 F. 2d 709 (4th Cir. 1956); *Spero* v. *Steamship The Argodon*, 150 F. Supp. 1 (E.D. Va. 1957); *Caddy* v. *Texaco, Inc.*, 292 N.E. 2d 348 (Mass. 1973); *Jussila* v. *Sause Bros. Ocean Towing Co., Inc.*, 512 P. 2d 795 (Ore. 1972); *Hudson Waterways Corp.* v. *Schneider*, 365 F. 2d 1012 (9th Cir. 1966); *Nicroli* v. *Den Norske Afrika-OG Australielinie, Etc.*, 332 F. 2d 651 (2d Cir. 1964); *Green* v. *Orion Shipping and Trading Co.*, 139 F. Supp. 431 (D. Md. 1956); *Mormino* v. *Leon Hess, Inc.*, 119 F. Supp. 314 (S.D. N.Y. 1953), aff'd, 210 F. 2d 831 (2d Cir. 1954).

Walker has been hostilely criticized in the law reviews,

See, 62 Yale L.J. 111; 65 Harv. L. Rev. 1238;

has been expressly distinguished in its own Circuit,

Dixon v. *United States*, 219 F. 2d 10 (2d Cir. 1955),

and has possibly been refuted in its own Circuit.

Dunbar v. *Henry Du Bois' Sons Co.*, 275 F. 2d 304 (2d Cir. 1960), cert. denied, 364 U.S. 815.

Yet, the trial court in the case at bar followed *Walker* in its charge to the jury and the opinion of the Court of Appeals for the First Circuit endorses *Walker* in affirming the actions of the trial court.

See, Peymann v. *Perini*, No. 74-1143, November 22, 1974, Appendix A.

A definitive ruling on the viability and propriety of the *Walker* doctrine is clearly required.

In addition, the Court of Appeals for the First Circuit has decided a Federal question in a manner which conflicts with the applicable decisions of this Honorable Court. Specifically, the Appeals Court erred in failing to keep completely separate and distinct the theories of negligence under the Jones Act and unseaworthiness under the General Maritime Law, thereby conflicting with the decisions of this Honorable Court.

See, Michalic v. *Cleveland Tankers, Inc.*, 364 U.S. 325 (1960); *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960).

This error resulted in the affirmation of the actions of the trial court by the Court of Appeals for the First Circuit to the severe prejudice of the rights of the petitioner.

For the aforesaid reasons, certiorari should be granted on both issues.

VIII.

Argument.

A. The "Walker Doctrine," Enunciated in the Case of Walker v. Lykes Bros. S.S. Co., 193 F. 2d 772 (2d Cir. 1952), is Tantamount to a Reassertion of the Defense of Assumption of Risk and is Therefore Violative of 45 U.S.C. § 54 (1970) and Case Law Construing Said Statute.

In the case of *Walker* v. *Lykes Bros. S.S. Co.*, 193 F. 2d 772, the Court of Appeals for the Second Circuit enunciated a doctrine which has been the source of a great deal of confusion and has resulted in inconsistent decisions by courts confronted with similar fact patterns.[1] In substance, the doctrine of *Walker* is that whenever a seaman is injured as a result of a condition which his duties of employment included the remedying of, recovery is barred on the theory that the seaman breached a consciously assumed contractual duty of his employment, thus

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[1] Most courts when confronted with the *Walker* doctrine have drawn fine distinctions to avoid its harsh consequences.

See, e.g., Jussila v. *Sause Bros. Ocean Towing Co., Inc.*, 512 P. 2d 795 (Ore. 1972); *Hudson Waterways Corp.* v. *Schneider*, 365 F. 2d 1012 (9th Cir. 1966); *Nicroli* v. *Den Norske Afrika-OG Australialinie, Etc.*, 332 F. 2d 651 (2d Cir. 1964); *Mason* v. *Lynch Bros. Co.*, 228 F. 2d 709 (4th Cir. 1956); *Spero* v. *Steamship The Argodon*, 150 F. Supp. 1 (E.D. Va. 1957); *Green* v. *Orion Shipping and Trading Co.*, 139 F. Supp. 431 (D. Md. 1956); *Mormino* v. *Leon Hess, Inc.*, 119 F. Supp. 314 (S.D. N.Y. 1953), aff'd, 210 F. 2d 831 (2d Cir. 1954); *Caddy* v. *Texaco, Inc.*, 292 N.E. 2d 348 (Mass. 1973).

Several courts have followed *Walker*.

See, e.g., Reinhart v. *United States*, 457 F. 2d 151 (9th Cir. 1972); *Elliott* v. *Jones & Laughlin Steel Corp.*, 166 F. Supp. 731 (W.D. Pa. 1957), aff'd, 259 F. 2d 959 (3d Cir. 1958); *Cooke* v. *The M V Wasaborg*, 189 F. Supp. 464 (D. Ore. 1960).

And several have refused to follow *Walker;* see discussion, *infra.*

permitting an employer's action for non-performance and thereby creating a set-off to the seaman's actions for damages.

It is submitted that the decision in *Walker* constitutes a "veiled" application of the defense of assumption of risk, a defense which was expressly written out of the general maritime law in 1936,

The Arizona v. *Anelich*, 298 U.S. 110 (1936),

and abolished in actions prosecuted under the Jones Act, 46 U.S.C. § 688 (1970), pursuant to the 1939 amendments to the Federal Employers' Liability Act, specifically, 45 U.S.C. § 54 (1970).

It is clear that in its charge to the jury in the case at bar the trial court instructed the jury in accordance with the principles set forth in *Walker*.

> "If you find that the duty of maintaining this engine room in a seaworthy condition was solely a duty which the plaintiff owed to his employer to perform, and if you find that the condition of unseaworthiness which was the cause of the plaintiff's accident was due solely to the failure of the plaintiff to carry out his duty to his employer to keep that engine room in a seaworthy condition, then you must find for the defendant in this case.
>
> "In short, the plaintiff cannot recover on the basis of an unseaworthy condition which is due wholly and solely to a failure on his part to perform the responsibilities that were assigned to him. That is one of the aspects of the case that it is the burden of the defendant to establish." *Peymann* v. *Perini Corporation*, No. 70-1411-S, Court's Charge to the Jury, p. 11.

It is also clear from the decision of the Court of Appeals for the First Circuit, in its opinion affirming the

actions of the trial court, that the First Circuit has reendorsed the *Walker* doctrine.

> *See Peymann* v. *Perini Corporation,* No. 74-1143, November 22, 1974, Appendix A.

It is the position of the petitioner that the lower courts have committed reversible error in that the *Walker* doctrine circumvents the decisions of this Honorable Court and the intent of Congress by breathing new life into the defense of assumption of risk.

In ascertaining the viability of the *Walker* doctrine in a seaman's action concerning the obligation of a seaman to avoid injury from an instrumentality, the control of which is presently within the scope of his duties of employment, analysis must begin with the landmark decision in *The Arizona* v. *Anelich,* 298 U.S. 110 (1936).

In an action to recover for injuries and death of a seaman caused by a defective appliance which was part of the equipment of a fishing vessel on which the seaman was employed, this Court, pursuant to established admiralty principles, held that assumption of risk is not a defense to an action brought under the Jones Act (46 U.S.C. §§ 688 et seq.)

> "The seaman assumes the risk normally incident to his perilous calling [citing cases], but it has often been pointed out that the nature of his calling, the rigid discipline to which he is subject, and the practical difficulties of his avoiding exposure to risks of unseaworthiness and defective appliances, make such a defense, as distinguished from contributory negligence [citing case], peculiarly inapplicable to suits by seamen to recover for the negligent failure to provide a seaworthy ship and safe appliances." (298 U.S. at 122-123.)

In holding the decision of *The Arizona, supra,* as not to be limited to seamen engaged in foreign voyages but also to be applicable to seamen injured aboard ships while in port, the Supreme Court in *Beadle* v. *Spencer,* 298 U.S. 124 (1936), stated:

> "Nor do we perceive any adequate ground for judicial relaxation of the admiralty rule, applicable under the Jones Act, that assumption of risk is not a defense to a suit to recover for injury to a seaman resulting from unseaworthiness or defective equipment, because he chances to be in some measure less amenable to the iron discipline of the sea than others who go upon foreign voyages. Even so his freedom to avoid the risk is far from comparable to that of the employee on land where the defense of assumption of risk originated and has been maintained. No such distinction appears to have been recognized in the maritime law. And we discern nothing in the purpose or in the language of the Jones Act or in the rules of liability which it prescribes to suggest that Congress undertook to introduce such a distinction into the maritime law." (298 U.S. at 129-130.)

The scope of the doctrine of *The Arizona* was further defined by this Honorable Court in *Socony-Vacuum Oil Co., Inc.* v. *Smith,* 305 U.S. 424 (1939), wherein the Court was confronted with the issue of

> ". . . [W]hether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance of the ship, when he chose to use the unsafe appliance instead of a safe method of doing his work, which was known to him." (305 U.S. at 424-425.)

In answering the above issue in the negative, the broad protective policies of the Admiralty, as illustrated by *The Arizona*, were deemed controlling:

> "Before the Jones Act a seaman was entitled to recover, from a vessel or its owner, indemnity for injuries due to an unseaworthy vessel, or for 'failure to supply and to keep in order the proper appliances appurtenant to the ship.' *The Osceola*, 189 U.S. 158, 175; *The Arizona* v. *Anelich, supra*, 120 *et seq.* Contributory negligence, then as now, was not a defense in suits brought by seamen to recover for injuries attributable to defective equipment, but was ground only for mitigation of damages. See *The Max Morris*, 137 U.S. 1; *The Arizona* v. *Anelich, supra*, 122, and cases cited. And no American case appears to have recognized assumption of risk as a defense to such a suit. [305 U.S. at 428-429.]
>
> . . . . . .
>
> "Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which attend shore employment, in relation to which the common law rules of assumption of risk and contributory negligence have been developed. [305 U.S. at 430.]
>
> . . . . . .
>
> "Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. *The Arizona* v. *Anelich, supra*, 123 and cases cited; *Calmar*

Steamship Corp. v. *Taylor,* 303 U.S. 525. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end. [Citing cases.]

"Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages. There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or in its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner. [Citing cases.] In either case the seaman's negligence is a contributing cause of his injury, without which the shipowner would be liable to the full extent of the damages. [305 U.S. at 431-432.]

. . . . . .

"We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available." [305 U.S. at 432.]

The status of the law remained relatively stable until the pronouncement in the landmark case of *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943). In reasoning that the congressional intent giving rise to enactment of the 1939 amendments to the Federal Employers' Liability Act[2] (53 Stat. 1404, 45 U.S.C. § 54), was to abolish all vestiges of the doctrine of assumption of risk to those within its protection, this Court stated:

> ". . . We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment. . . . As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name'." (318 U.S. at 58.)

After tracing the development of the doctrine of assumption of risk, the Court commented upon some of the attendant problems raised by the doctrine:

> "Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. [Citing cases.] Other complications arose from the introduction of 'promise to repair,' 'simple tool,' and 'peremptory order' concepts into the assumption doctrine. . . .

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[2] It is well settled that the Jones Act incorporates in toto the provisions of the F.E.L.A. and all amendments thereto. *See generally*, G. Gilmore & C. Black, *The Law of Admiralty* (1957), at 296-98.

"It was this maze of law which Congress swept into discard with the adoption of the 1939 amendment to the Employers' Liability Act, *releasing the employee from the burden of assumption of risk by whatever name it was called.* The result is an Act which requires cases tried under the Federal Act to be handled *as though no doctrine of assumption of risk had ever existed.* [Emphasis added.] [318 U.S. at 63-64.]

. . . . . .

"The doctrine of assumption of risk can not be 'abolished in toto' and still remain in partial existence. . . . The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon." (318 U.S. at 66-67.)

In 1950, the Second Circuit Court of Appeals was confronted with the analogous issue to that at bar. Careful to distinguish the policies inherent in the admiralty from those applicable to shore-based employees, the court held that assumption of risk was not a defense to an action brought by a seaman under the Jones Act to recover for injuries sustained when he slipped on oil in a tank, responsibility for cleaning the tank being part of his duties as chief officer. (*Becker* v. *Waterman S.S. Corp.*, 179 F. 2d 713 (2d Cir. 1950).)

"The appellant contends that there can be no recovery . . . because the chief officer was under a duty to correct a dangerous condition of which he had

knowledge, and sustained his injuries by reason of the very condition he was employed to correct." (179 F. 2d at 714.)

While recognizing that the above circumstance would constitute a bar when dealing with a shore-based employee,[3] the court refused to hold that plaintiff had "assumed the risk" and was thereby barred:

> "But assumption of risk is not a defense to an action under the Jones Act for reasons discussed at length in *Socony-Vacuum Oil Co.* v. *Smith* [*supra*]. By incorporating the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., the Jones Act brought into the maritime law new rules of liability. . . . If the plaintiff was also negligent in failing to see the blob of oil on which he slipped, his own negligence may reduce the amount of his recovery but is not a bar to his action. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U.S. 424, 431, 59 S. Ct. 262, 83 L. Ed. 265 [1939]." (179 F. 2d at 714-715.)

Thus, it seemed settled that the doctrine of assumption of risk, "under any other label in the common law lexicon"[4] had no application in maritime tort actions. However, the status of the law was soon to be tossed into another state of confusion by the Second Circuit decision of *Walker* v. *Lykes Bros. S.S. Co., Inc.*, 193 F. 2d, 772 (2d Cir. 1952).

In a suit by a master of a vessel to recover for injuries sustained when the roll of the vessel caused a steel drawer

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[3] See *Byars* v. *Moore-McCormack Lines, Inc.*, 155 F. 2d 587 (2d Cir. 1946), and *Kowalsky* v. *Conreco Co., Inc.*, 264 N.Y. 125, 190 N.E. 206 (1934).

[4] *Tiller, supra*, 318 U.S. at 67.

of a cabinet in his quarters to open into him unexpectedly, the defective condition of which the master had knowledge, recovery was held to be barred via the theory that the master breached his contractual duty to his employer. In drawing a hazy distinction between contributory negligence and assumption of risk on one side and a breach of the contract of employment on the other, the Circuit Court stated:

> ". . . The important thing in situations like that at bar is to distinguish between such a duty, which the law imposes upon the injured person, regardless of any conscious assumption of a duty towards the wrongdoer, and a duty which the injured person has consciously assumed as a term of his employment. By 'contributory negligence' which results in no more than reducing the amount of an employee's recovery, the Act means the first; the second is a bar to any recovery." (193 F. 2d at 773.)

Illustrative of the confusion resulting from *Walker* v. *Lykes, supra,* is the decision of *Dixon* v. *United States,* 120 F. Supp. 747 (S.D. N.Y. 1954), remanded, 219 F. 2d 10 (2d Cir. 1955). Suit was brought in the Federal District Court by a former chief mate to recover for injuries sustained when he fell from a ladder which he was inspecting pursuant to his duties. The District Court held that the plaintiff's recovery, upon a theory of unseaworthiness, could not be defeated upon a claimed defense of assumption of risk. In reliance upon *Socony-Vacuum, supra,* the court stated:

> "Moreover, the whole drift of the law has been away from the result urged here by respondent.
>
> . . . . . .

"To carve out an exception to a shipowner's liability to his crewmen for unseaworthiness based upon assumption of risk would be vitalizing a defense which the Supreme Court has consistently rejected through the years." (120 F. Supp. at 750-751.)

On appeal, 219 F. 2d 10 (2d Cir. 1955), the Appeals Court, Harlan, J., went to great lengths to distinguish *Walker* v. *Lykes*. In the course of his opinion, Judge Harlan had occasion to comment upon the inapplicability of the doctrine of assumption of risk in admiralty, and its specific inapplicability to the case then at bar:

". . . [T]he American courts have uniformly refused to allow assumption of risk as a defense to a seaman's action for injuries under the general maritime law. See discussion in *The Arizona* v. *Anelich*, 1936, 298 U.S. 110, 56 S. Ct. 707, 80 L.Ed. 1075; *Socony-Vacuum Oil Co.* v. *Smith*, 1939, 305 U.S. 424, 59 S. Ct. 262, 83 L.Ed. 265. *Hence, even though it was part of Dixon's duty to check the ladder and he had proceeded to the job with actual knowledge of the dangerous condition of the upper rungs, the shipowner could not have said that Dixon thereby assumed the risks involved.* See *Becker* v. *Waterman S.S. Corp.*, 2 Cir., 1950, 179 F. 2d 713. . . . The only question can be as to whether the amount of the recovery should be mitigated by reason of contributory negligence in descending the ladder instead of using other means to check it. See *The Arizona, supra.*"[5] (Emphasis supplied.) (219 F. 2d at 16.)

[5] The *Dixon* decision was consistent with the development of a body of law under the F.E.L.A. as is evidenced by the 1954 decision of *Louisiana & Arkansas Ry. Co.* v. *Johnson*, 214 F. 2d 290 (5th Cir.) certiorari denied, 348 U.S. 875 (1954), wherein the

It is significant that the major cases upon which *Walker* v. *Lykes, supra,* was based were all rendered *prior* to the 1939 amendments to the F.E.L.A. Those cases established the so-called "primary duty" rule which was the cornerstone of *Walker.* Cases subsequent to *Tiller, supra,* have been quick to note this fact, adding that *Tiller, supra,* instructed that,

> "'. . . every vestige of the doctrine of assumption of risk was obliterated from the law. ". . . Since that decision, in cases arising under the [F.E.L.A.], even the engineer has been held not barred by the 'primary duty rule'."[6] (214 F. 2d at 292.)

Court of Appeals for the Fifth Circuit, discussing the earlier decisions in *Unadilla Valley Ry Co.* v. *Caldine,* 278 U.S. 139 (1928), *Southern Ry. Co.* v. *Youngblood,* 286 U.S. 313 (1932), and *Davis* v. *Kennedy,* 266 U.S. 147 (1924), concluded: "All of these cases were decided before the 1939 amendment to the Federal Employer's Liability Act, now brought forward as 45 U.S.C.A. § 54, did away with the defense of assumption of risk. At that time, the so-called 'primary duty rule' was applied to the conductor in *Unadilla Valley Ry Co.* v. *Caldine, supra,* and *Southern Ry. Co.* v. *Youngblood, supra,* and to the engineer in *Davis* v. *Kennedy, supra.* Following the enactment of the 1939 amendment, the Supreme Court held that 'every vestige of the doctrine of assumption of risk was obliterated from the law' and that the '"primary duty rule"' in *Unadilla Valley Ry Co.* v. *Caldine, supra,* and *Davis* v. *Kennedy, supra,* had been 'swept into discard'. *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U.S. 54, 58, 63, 64. Since that decision, in cases arising under the Federal Employers' Liability Act, even the engineer has been held not barred by the 'primary duty rule', *Atlantic Coast Line R. Co.* v. *Mangum,* 250 Ala. 431, 34 So. 2d 848, 852; *Atlantic Coast Line R.R.* v. *Anderson,* 200 Ga. 801, 38 S.E. 2d 610, see also *Keith* v. *Wheeling & L. E. Ry Co.,* 6 Cir., 160 F. 2d 654, 657."

[6] In each of the Supreme Court cases upon which the *Walker* court relied the engineer was killed by breaking a rule or regulation, compliance with which was deemed part of the contract of employment. *See, e.g., Louisiana & Arkansas Ry. Co.* v. *Johnson,* 214 F. 2d 290, 292 (5th Cir. 1954), cert. denied, 348 U.S. 875.

Law review articles subsequent to *Walker* v. *Lykes, supra,* have hostilely criticized the decision. One commentator opined:

> "Even if the assumption be made that Congress never acted to discard the 'primary duty' doctrine, application of the rule in the *Walker* case would be unwarranted. In all previous cases the employer was immunized from liability by a worker's breach of an express rule directed to a specific contingency—a duty clear, limited, and easy of execution. But the *Walker* opinion extends this protection to circumstances where the employee merely breached a broad cautionary injunction covering myriad details of a complex enterprise. ("Use of 'Primary Duty' Doctrine to Frustrate Comparative Negligence for Railway Workers and Seamen," 62 Yale L.J. 111, at 113-114; *see also,* 65 Harv. L. Rev. 1238.)

Until the decision to which this petition is directed, the only First Circuit case confronted with the application of the *Walker* v. *Lykes* doctrine is *Boat Dagny* v. *Todd,* 224 F. 2d 208 (1st Cir. 1955), wherein the First Circuit refused to apply said doctrine. In an action by the master of a fishing vessel for injuries sustained in the middle of the night by a fall on a slippery, unlighted deck following the failure of electric power, it was held that the failure, if any, of the master in due performance of his supervisory responsibility to see to it that the ship's engineer got the electric power restored, was but a species of contributory negligence on the master's part. As such, the negligence would serve to diminish the recoverable damages, but would *not* serve as a complete bar to recovery.

In his decision, Chief Judge Magruder states his belief that *Walker* v. *Lykes, supra,* was based upon a misinterpretation of the 1939 amendments to the F.E.L.A. and the *Tiller* decision:

"It is true that the plaintiff in the due performance of his supervisory responsibilities as master might perhaps have been able to see to it that the engineer got the electric power restored. But if so, his failure to do this was but a species of contributory fault on the plaintiff's part which would go only in diminution of damages instead of being a complete bar to the action. Judge Hand does indicate, in *Walker* v. *Lykes Bros. S.S. Co., Inc., supra,* that where the master of a ship contributes to his own injury by reason of a breach of his supervisory duties owed to his employer, that is not the type of 'contributory negligence' which results under the Act in a mere diminution of the amount of recovery, but rather is a breach of duty to the shipowner which bars the master's recovery 'absolutely.' [224 F. 2d at 210-211.]

. . . . . .

"We cannot find in the Act any suggestion that the Congress had in mind this refinement between the two species of contributory fault. It is significant that Judge Hand felt himself to be bound by cases which were decided before the 1939 amendment to the Federal Employers' Liability Act, which plugged up what the Congress deemed to be a leak in the original Act, by abolishing specifically the defense of assumption of risk." (224 F. 2d at 211.)

Judge Magruder's decision was based upon *Tiller* and the broad scope and purpose of the 1939 amendments, and the Fifth Circuit case of *Louisiana & Arkansas Ry. Co.* v. *Johnson, supra.*[7]

[7] It is significant to note that the Supreme Judicial Court of Massachusetts, when confronted with analogous issues to those at bar, refused to apply any vestige of the doctrine of assumption of

In 1960, the Second Circuit, in the case of *Dunbar* v. *Henry Du Bois' Sons Co.*, 275 F. 2d 304, expressly declined to follow *Walker*. The case involved an action by the administratrix of the estate of a deceased deck hand who was killed when a derrick upon which he was riding capsized. Speaking for a unamious panel, Judge Waterman stated:

> "Appellant argues that the *Walker* case should govern here to preclude plaintiff's recovery. Appellant points out that one of Dunbar's principal duties aboard the Trenton when in tow was to man the pumps should leakage occur. The argument continues that the jury, in returning a verdict for plaintiff, must have accepted appellant's contention that the Trenton capsized because of leakage resulting from improper caulking; and that the jury's finding that Dunbar was 20 per cent negligent can only be based upon his failure to put the pumps to work. Thus appellant concludes that Dunbar's breach of his contractual duty to man the pumps was a significant cause of the accident. Moreover, appellant suggests that Dunbar, the sole employee aboard the Trenton, might be regarded as its Chief Officer should such status be deemed essential in order to invoke the *Walker* doctrine.
>
> "We of this panel are in complete agreement that the statements made in the *Walker* opinion do not operate to bar recovery in the present case. Our reasons supporting this unanimity of result differ.
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> . . . . . .

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risk to a variety of seaman's actions prosecuted in the State court. See *Caddy* v. *Texaco, Inc.*, 292 N.E. 2d 348 (Mass. 1973); *Boudreau* v. *Boat Andrea G. Corp,*. 350 Mass. 473, 215 N.E. 2d 907 (1966); *Bono* v. *Ocean Wave, Inc.*, 350 Mass. 470, 215 N.E. 2d 666 (1966); the same action was taken by the Supreme Court of Oregon in *Barrell* v. *Brown*, 495 P. 2d 733 (1973).

> "Judge Clark and I believe that the *Walker* doctrine is incompatible with the congressional mandate that contributory negligence and assumption of risk shall not bar a recovery in a Jones Act case. See *Boat-Dagny* v. *Todd.*" (275 F. 2d at 305, 306.)

In 1962, in *Ktistakis* v. *United Cross Navigation Corp.*, 204 F. Supp. 293 (S.D. N.Y. 1962) affirmed on this issue at 316 F. 2d 869 (2d Cir. 1963), the District Court refused to follow *Walker*. The action was brought for personal injuries under a theory of unseaworthiness by a second mate, who, as officer in charge of the watch, had a duty to clean an oil spill and sawdust from the deck. His injuries resulted from slipping and falling on the same oil and sawdust condition that it was his duty to remedy:

> "The plaintiff, as second mate and the officer in charge of the watch, had a duty to clean the oil spill and sawdust from the deck. He claims that he had no knowledge that the condition existed. However, as the officer in charge, it was his duty to discover such things and remedy them." (204 F. Supp. at 295.)

Citing the aforementioned cases and law review articles as authority for its refusal to follow *Walker*, the court stated:

> "In the case at hand the plaintiff may very well have been derelict in not discovering and remedying the unseaworthy condition. However, this does not bar him completely." (204 F. Supp. at 296.)

Based upon the decision in *Dunbar* v. *Du Bois, supra,* the viability of *Walker* was questioned in *Nicroli* v. *Den Norske Afrika-OG Australielinie, Etc.,* 332 F. 2d 651 (2d Cir. 1964), and *Hudson Waterways Corporation* v. *Schneider,* 365 F. 2d 1012, 1016, n.1 (9th Cir. 1966).

However, new life has been given the *Walker* doctrine by the decisions of the Ninth Circuit Court of Appeals in *Reinhart* v. *United States,* 457 F. 2d 951 (9th Cir. 1972), and by the First Circuit Court of Appeals in the decision to which this petition is directed.

It is submitted that the *Walker* doctrine violates the judicial and congressional mandates abolishing the defense of assumption of risk in any of its myriad forms and its rebirth is in contradiction of the intent of both Congress and this Honorable Court. It is further submitted that the Appeals Court to which this petition is directed committed reversible error in affirming the trial court's actions in following the *Walker* decision.

It is one thing to hold that a plaintiff is barred from recovery because his own negligence was the sole cause of his injury. It is quite a different matter to hold that a plaintiff is barred because he breached a duty to his employer which he consciously assumed when he entered into the employment relationship. The former is a proper legal conclusion based upon the doctrine of comparative negligence. The latter is a circuitous method of applying the defense of assumption of risk.

Furthermore, by following the doctrine of *Walker,* the Court of Appeals for the First Circuit has contributed to the disruption of the uniformity of the Admiralty caused by the *Walker* decision, a uniformity which this Honorable Court has deemed on many occasions to be a matter of overriding concern.

B. The Court of Appeals for the First Circuit Erred in Ruling that Proof of Unseaworthiness was a Necessary Element of the Claim for Negligence under the Jones Act.

In its decision affirming the actions of the trial court in directing a verdict for the defendant on the count for negli-

gence under the Jones Act, the Court of Appeals for the First Circuit stated:

> "Turning to Count One, it was proper to direct a verdict under the Jones Act count in view of the fact that a necessary element of that claim was proof of unseaworthiness. As plaintiff pointed out in his request for instructions, the only negligence asserted under Count One was the failure to furnish a seaworthy vessel. This failure was the sole issue under the second count. Since manifestly plaintiff could not have cumulative recoveries, *Myers* v. *Isthmian Lines, Inc.*, 1 Cir., 1960, 282 F. 2d 28, 29-30 & n.1, *cert. denied*, 365 U.S. 804, and could not recover under the Jones Act count at all unless he established unseaworthiness, it was appropriate to submit that issue to the jury, under the second count, as the single question. *Blankenship* v. *Ellerman's Wilson Line, New York, Inc.*, 4 Cir., 1959, 265 F. 2d 455, cited with approval in *Myers*." *Peymann* v. *Perini Corp.*, No. 74-1143, November 22, 1974, pp. 7-8; Appendix A.)

It is submitted that this statement is an erroneous one as regards the proper principles to be applied in a maritime action for negligence under the Jones Act.

It is, of course, settled that the theories of Jones Act negligence and unseaworthiness under the general maritime law are completely distinct, independent and separate concepts,

> *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325 (1960); *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960),

and it seems that liability may exist in negligence and not in unseaworthiness.

Price v. *SS Yaracuy*, 378 F. 2d 156 (5th Cir. 1967); *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 418 (1953) (concurring opinion); *Malm* v. *United States Lines Co.*, 269 F. Supp. 731 (S.D. N.Y. 1967), aff'd 378 F. 2d 941 (2d Cir. 1967); *Lunsford* v. *Halcyon S.S. Co.*, 354 F. Supp. 573 (E.D. Pa. 1973), wherein it was held that unseaworthiness and negligence are distinct concepts and a finding that ship was not unseaworthy because of a failure to provide a ladder is not inconsistent with a finding that the failure constituted negligence.

It is also settled that the same set of facts can constitute negligence as well as unseaworthiness,

See generally, Norris, *The Law of Seamen*, Third Ed. 1970, §§ 692, 625.

and the petitioner concedes that, as noted by the Appeals Court, the theories of liability relied upon in the case at bar to establish both Jones Act negligence and unseaworthiness under the general maritime law were the same: the absence of a piece of the vessel's regular equipment (a ladder); oil on the railing surrounding the engine upon which the petitioner was compelled to stand; and the shipowner ordering a three-man task to be performed by two men.

However, to rule that a plaintiff must establish unseaworthiness as a necessary element of a Jones Act action for negligence is introducing a heavier burden of proof upon a Jones Act seaman than was intended by Congress and by this Honorable Court in shaping the parameters of the maritime law.

Negligence under the Jones Act has always been accorded a liberal interpretation. (*See, Jamison* v. *Encarnacion*, 281 U.S. 635 (1930); *Alpha S.S. Corp.* v. *Cain*, 281 U.S. 642

(1930).) In furtherance of this humanitarian policy of a liberal interpretation,

> ". . . the obligation of a shipowner to his seamen is substantially greater than that of an ordinary employer to his employees." *Koehler* v. *Presque-Isle Transp. Co.*, 141 F. 2d 490, 492 (2d Cir. 1944); *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944).

It is settled that the test as to the quantum of negligence necessary for a plaintiff to recover under the Jones Act is

> ". . . simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Ferguson* v. *Moore-McCormack Lines*, 352 U.S. 521, 523 (1957), citing *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957).

This standard has led one court to conclude that:

> "In a Jones Act case, a trial court can direct a jury verdict against a plaintiff '*only* in those extremely rare instances where there is a *zero* probability either of employer negligence or that any such negligence contributed to the injury of an employee.'" (Emphasis in opinion.) *Southard* v. *Independent Towing Company*, 453 F. 2d 1115, 1118 (3d Cir. 1971), citing *Bailey* v. *Central Vermont Railway, Inc.*, 319 U.S. 350 353-354 (1943).

It is respectfully submitted that the instant case did not fall within that narrow range of cases wherein a directed verdict would be appropriate and that the Court of Appeals for the First Circuit erred in ruling as it did in affirming the actions of the Trial Court.

IX.

Conclusion.

It is respectfully submitted that the United States Court of Appeals for the First Circuit has rendered a very significant decision which will have a two-fold effect. First, the decision, in following the case of *Walker* v. *Lykes Bros. S.S. Co., supra,* will serve to reinstate the defense of assumption of risk in seaman's actions. Second, the decision will serve to increase the plaintiff's burden in actions prosecuted for negligence under the Jones Act. As a result, the decision serves to disrupt the uniformity of the Admiralty and General Maritime Law which this Honorable Court has so often stated to be of paramount importance.

Respectfully submitted

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Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 74-1143.

HANS PEYMANN,
PLAINTIFF, APPELLANT,
v.
PERINI CORPORATION,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before
ALDRICH, MCENTEE and CAMPBELL,
Circuit Judges.

David B. Kaplan, with whom *Kaplan, Latti and Flannery* was on brief, for appellant.
James C. Gahan, Jr., for appellee.

November 22, 1974

ALDRICH, *Senior Circuit Judge.* Plaintiff, a seaman, brought suit against his employer, a shipowner, in the usual counts: Count One for negligence under the Jones Act, 46

U.S.C. § 688; Count Two for unseaworthiness, and a maintenance count not presently involved. The court directed a verdict for the defendant on Count One, and the jury found for the defendant on Count Two. Plaintiff alleges error in the direction of the verdict and, with respect to the second count, in the charge. For reasons we will come to, there was no error in directing the verdict. We will deal first with Count Two.

[2] Before doing so, however, we express strong criticism of plaintiff's counsel for an inadequate appendix. No experienced Jones Act practitioner could think that the skimpy excerpts of testimony set forth were all that were relevant to the questions at issue. This selective presentment is a violation of F.R.A.P. 10(b). *Cf. Moran Towing Corp.* v. *M. A. Gammino Constr. Co.*, 1 Cir., 1966, 363 F.2d 108, 109. We have long complained of a practice obliging the appellee to fill in substantial interstices, in turn requiring us to sashay from one appendix to the other. *Chernack* v. *Radlo*, 1 Cir., 1964, 331 F.2d 170, 171-72. We notify the bar that serious breaches by an appellant in this respect hereafter may result in the imposition of costs chargeable against counsel personally. Plaintiff in this case offended not only with respect to the testimony, but in over-reducing the charge.

Plaintiff's claim of unseaworthiness is based upon the following facts. On the day in question defendant's tug Gorham Whitney was docked undergoing a substantial engine overhaul. This was being done by plaintiff, who was the chief engineer, and one assistant. It was necessary to raise the cylinder heads, one at a time, from the engine. This was effected by a chain fall (a chain and pulley device) temporarily attached to a shackle in the deck immediately overhead. The fall weighed some forty pounds, and while plaintiff was attaching it in this instance he slipped and fell, injuring his back.

In order to affix the fall to the ceiling, plaintiff was obliged to stand upon something. He testified that defendant should have furnished him a stepladder; that he looked for such but could not find one, and that, accordingly, he was obliged to stand "like a bird" on an iron pipe rail which, unnoticed by him until afterwards, was covered with oil. He further testified that it was customary to [3] have three men on the job, but that defendant had constantly refused his requests for this additional help.

On this basis plaintiff claimed that defendant had supplied a place to work that was unsafe in three particulars: no ladder; oil on the rail, and insufficient assistance. Defendant's response was that a ladder was available; that plaintiff should not have stood on the rail, at least without wiping it, and that it was not customary, or necessary to have three men when the work was proceeding at a leisurely pace at the dock instead of by emergency repair at sea. Defendant, in addition, obtained an admission from plaintiff that as chief engineer in charge of the engine-room it was his duty to obtain the stepladder if one was available and needed, and to maintain proper working conditions and "keep this engine rail clean and free from various substances like oil. . . ." Plaintiff countered that the oil "is drippings from the cylinder heads when we take them off and the liners out. There's always some oil coming down to the railing and the floor"—a somewhat self-stultifying position for plaintiff to take in view of his admittedly mounting the railing without looking for, and removing, the oil he knew, on that basis, was necessarily there.

The portion of the charge to which plaintiff objects is the following.

> "If you find that the duty of maintaining this engine room in a seaworthy condition was solely a duty

> which the plaintiff owed to his employer to perform, and if you find that the condition of unseaworthiness which was the cause of the plaintiff's accident was due solely to the failure of the plaintiff to carry out his duty to his employer to keep that engine room in a seaworthy condition, then you must find for the defendant in this case.
>
> "In short, the plaintiff cannot recover on the basis [4] of an unseaworthy condition which is due wholly and solely to a failure on his part to perform the responsibilities that were assigned to him. That is one of the aspects of the case that it is the burden of the defendant to establish. . . . [that it was solely the plaintiff's duty to keep this engine room in a seaworthy condition.]"

The bracketed material was not included in plaintiff's appendix. Nor was the court's full explanation of the pro rata rule if plaintiff's negligence was only contributory—that if plaintiff's injury was due only in part to his failure and in part to improper conduct by defendant, plaintiff might recover ratably . *See Socony-Vacuum Oil Co.* v. *Smith,* 1939, 305 U.S. 424, 431; *Donovan* v. *Esso Shipping Co.,* 3 Cir., 1958, 259 F.2d 65, 67, *cert. denied,* 359 U.S. 907. Finally, at plaintiff's request the court illustrated and charged in explicit terms that defendant could not rely upon any principle of assumption of the risk.

We cannot read the charge as a whole without concluding that it fairly informed the jury that, irrespective of plaintiff's duty, defendant would be liable if there should have been three men present and the absence of the third man contributed to the accident; or if a stepladder was needed but was not available; or if, in the jury's view, plaintiff was only contributorily negligent. Consequently the complained-of instruction was, both because of other instruc-

tions, and in direct terms, applicable only if the jury found that the accident was due solely to the failure of plaintiff, as the one in charge, to have the engine room seaworthy by obtaining an available ladder or, if it was proper to use the rail, to see that it was free of oil before he stepped on it.

The question of the ladder need not detain us. If a vessel makes available two means for performing an act, one of which is unsafe, *e.g.*, two tools, one of which is defective, [5] or two ladders, one of which is slippery, it would be an indirect application of the proscribed doctrine of assumption of the risk to foreclose recovery completely if the seaman chose the less desirable alternative. *Cf. Socony-Vacuum*, ante, 305 U.S. at 431-32. But this does not mean that a seaman may not be wholly barred if he selects a method he could not reasonably think open to him. Thus if the cook were given a proper bottle opener but chose to knock the head off the bottle, he could not complain. Or if there were two gangways and one was marked "Do not use," it could not be thought that a seaman insisting upon using it despite the proferred alternative could complain of the ship's unseaworthiness. So, in the case at bar, if there was a ladder available which was the single means the engineer was supposed to use, as, indeed, his own testimony suggested, it would not be proper to hold the vessel responsible to any degree if his decision not to use it was a free choice. *Berke* v. *Lehigh Marine Disposal Corp.*, 2d Cir., 1970, 435 F.2d 1073, *cert. denied*, 404 U.S. 825 (seaman injured when not using safety line; no evidence line was not available). The court made its charge particularly clear by conditioning non-liability upon a finding that plaintiff, as the person having full freedom of decision, was the sole cause of his accident. This is not a case where a lower echelon employee was offered defective means, so

that both he and the ship may have been at fault. *Cf. Noack* v. *American Steamship Co.*, 6 Cir., 1974, 491 F.2d 937.

Similar reasoning applies if plaintiff, having the primary duty to clean up oil, unnecessarily proceeded without doing so. If a seaman had spilled oil and then, rejecting an opportunity to wipe it up, had walked in it, it would shock the conscience to allow him to recover. The rule is settled that such negligent use of an otherwise seaworthy vessel [6] precludes relief. *See Sotell* v. *Maritime Overseas, Inc.*, 2 Cir., 1973, 474 F.2d 794, 796; *June T., Inc.* v. *King*, 5 Cir., 1961, 290 F.2d 404, 407; *Williams* v. *The S.S. De Larrinaga*, 4 Cir., 1961, 287 F.2d 732, 735; *Donovan* v. *Esso Shipping Co.*, ante, 259 F.2d at 67; *Seitz* v. *M.V. The Captantonis*, D.Or., 1962, 203 F.Supp 723. We see little difference in the present case. Plaintiff, in charge of the operation, knew that the cylinder heads dripped oil. He knew, too, that it was his duty to keep the engineroom in a safe condition. Instead of passing a rag over the rail, he proceeded, indifferently, to step on it, and then, unless the court's instruction was correct, would seek to hold the ship even though the jury were to find the fault solely his.[1]

In similar circumstances, recovery was barred in *Walker* v. *Lykes Bros. S.S. Co.*, 2 Cir., 1952, 193 F.2d 772, where a

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[1] The extreme nature of plaintiff's contention may be illustrated by the following quotation from his reply brief.

> "[A]s indicated in . . . appellant's Brief the film of oil on the engine rail that Mr. Peymann observed after his fall was continuously present during an overhaul operation. Simple logic dictates that if Mr. Peymann was required to continuously wipe the oil from the rail every time oil dripped from the engine's cylinder heads, the overhaul task would never be completed."

To us simple logic dictates that plaintiff had to wipe the oil off the rail only when he was about to stand on it to fasten or unfasten the chain fall.

ship's master was injured in his own quarters by broken equipment he was charged to repair, but neglected to attend to. *Walker* has been read to bar recovery whenever a seaman's injury has been caused in part by the breach of his contractual duty to his employer, thus permitting an employer's action for non-performance, and creating a set-off. *See Reinhart* v. *United States*, 9 Cir., 1972, 457 F.2d 151, 154. On that broad reading, *Walker's* guidance was properly declined by this court in *Boat Dagny, Inc.* v. *Todd*, 1 Cir., 1955, 224 F.2d 208, where the plaintiff breached his duty to supervise someone else, but the ship was independently at fault. In *Boat Dagny* the ship was made unsea- [7] worthy by reason of a defective generator. When the ship's lighting failed as a consequence, the master was injured. The defendant showed that the engineer could have repaired the generator if he had exercised due care, and charged that because the master's duty was to supervise the engineer, the master could not recover. Observing that the fellow servant rule no longer applies in admiralty, we held that the master's failure sufficiently to supervise the engineer was but a contributory fault.

We regard this as quite different from *Walker*, where the master failed to supervise himself, and the fault was his alone. While we criticized some of the court's language, *Boat Dagny* does not contradict a strict reading of *Walker* that a seaman may not recover where his breach of duty constitutes the sole cause of injury. Our decision merely followed the self-evident proposition that not every breach of duty will assign a seaman full responsibility for his injury. *See also Noack*, ante, 491 F.2d at 941; *Mason* v. Lynch *Bros. Co.*, 4 Cir., 1956, 288 F.2d 709, 712; *Becker* v. *Waterman S.S. Corp.*, 2 Cir., 1950, 179 F.2d 713, 715-16. In the case at bar, as in *Walker*, the jury might have found it was plaintiff's primary duty to maintain the engineroom in a

seaworthy condition, and that his conduct in stepping on the rail without first wiping off the oil, placed there by his own conduct, was his sole responsibility.[2]

Turning to Count One, it was proper to direct a verdict [8] under the Jones Act count in view of the fact that a necessary element of that claim was proof of unseaworthiness. As plaintiff pointed out in his request for instructions the only negligence asserted under Count One was the failure to furnish a seaworthy vessel. This failure was the sole issue under the second count. Since manifestly plaintiff could not have cumulative recoveries, *Myers* v. *Isthmian Lines, Inc.*, 1 Cir., 1960, 282 F.2d 28, 29-30 & n. 1, *cert. denied*, 365 U.S. 804, and could not recover under the Jones Act count at all unless he established unseaworthiness, it was appropriate to submit that issue to the jury, under the second count, as the single question. *Blankenship* v. *Ellerman's Wilson Line, New York, Inc.*, 4 Cir., 1959, 265 F.2d 455, cited with approval in *Myers*. No purpose would be served in asking the jury to travel a second, and longer, road, to the same destination.

Affirmed.

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[2] This holding is not to disagree with a recent state case, *Caddy* v. *Texaco, Inc.*, 1973 Mass. A.S. 177, 292 N.E.2d 348. There a seaman was instructed to clean up oil and do some other work, but was not told in what order to proceed. The court held that his doing the other work first could only make him contributorily negligent. Here plaintiff was the one to tell himself. Whatever may be the limits of this doctrine, there must be a point where one in charge cannot give himself the wrong instruction and then recover from the ship. Without deciding, we may suggest that if in *Caddy* the seaman had been instructed to clean up the oil first, but had gone ahead, instead, with his other work, he could not recover for slipping in the oil because (by hypothesis, he had been offered a safe place to work but had taken the unsafe place, against orders). If he followed orders he would have had a safe place to work.

Appendix B.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 74-1143.

HANS PEYMANN,
PLAINTIFF, APPELLANT,

v.

PERINI CORPORATION,
DEFENDANT, APPELLEE.

JUDGMENT

Entered November 22, 1974

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The orders of the District Court are affirmed.

Appendix C.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 74-1143.

HANS PEYMANN,
PLAINTIFF, APPELLANT,
v.
PERINI CORPORATION,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before
ALDRICH, McENTEE and CAMPBELL,
Circuit Judges.

ON PETITION FOR REHEARING

David B. Kaplan, with whom *Kaplan, Latti and Flannery* was on brief, for appellant.
James C. Gahan, Jr., for appellee.

December 24, 1974

ALDRICH, *Senior Circuit Judge.* Plaintiff has filed a petition for rehearing addressed to the propriety of our

ruling that the jury verdict for the defendant on the unseaworthiness count rendered moot, or disposed of, plaintiff's claim that he should have been permitted to go to the jury on the negligence count. While we find the petition without merit, the brief in support is based upon a misconception it might be well to answer.

The district court in its charge defined as unseaworthiness all of the deficiencies asserted as resulting from de-
[2] fendant's alleged negligence. Except for flirting with some manifestly mistaken definitions of unseaworthiness [1] plaintiff "concedes that, as noted by this Court, the theories of liability relied upon in the case at bar to establish both Jones Act negligence and unseaworthiness under the general maritime law were the same." His contention is not that we misidentified the bases of liability, but that we misunderstood "the distinction between causation in Jones Act negligence and causation in the general maritime remedy of unseaworthiness." Plaintiff says that while "under Rogers, [*Rogers* v. *Missouri Pacific R.R. Co.*, 1957, 352 U.S. 500] causation would be established if the defendant's negligence contributed, in whole or in part (even the slightest), to the Petitioner's injuries," it "seems clear that causation in an allegation of unseaworthiness requires causation in the common law sense *or something very close thereto,*" [Emphasis supplied] and consequently placed a higher burden upon him. We emphasize the waffling because plaintiff neither explains its meaning nor supports it; the heavy burden of "causation in the common law sense" is supported by (and only by) Devitt & Blackmar, Federal Jury Practice and Instructions, 2d ed. 1970, ¶ 93.09. This is a misunderstanding of the law applicable to seamen.[2]

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[1] *E.g., Lunsford* v. *Halcyon S.S. Co.*, E.D. Pa., 1973, 354 F.Supp. 573, 577.

[2] We have frequently expressed our apprehensions with respect to general compilations of jury instructions. *See, e.g., McMillen* v.

The reason why under the Jones Act the plaintiff is entitled to a charge that he need show only that defendant's negligence contributed to his injury was fully explained in *Rogers*. Basically it is because, as distinguished from the common law, where defendant's negligence must be the [3] "sole, efficient, producing cause" and plaintiff would be barred if his own negligence was a contributing cause, the Jones Act "expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence." *See* 352 U.S. at 505-507. But so does the law of unseaworthiness. *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U.S. 406. This does not mean, in either instance, that defendant's fault must not be shown to be *a* cause — there must, of course, be a connection — it merely need not be *the* cause. The distinction was well brought out in *Farnarjian* v. *American Export Isbrandtsen Lines, Inc.*, 2 Cir., 1973, 474 F.2d 361, at 364.

We note, in conclusion, that the district court properly charged the jury in exactly this sense.[3]

Petition denied.

United States, 1 Cir., 1967, 386 F.2d 28, at 32. They are dangerous because no authors, however erudite, can have a comprehensive substantive background in all fields. In ¶ 93.05 of Devitt & Blackmar there is a suggested special interrogatory, supposedly, (but, on investigation not), supported by authority, that would be jettisoned by any admiralty lawyer. Our objection to these compilations is that they may lull unsuspecting judges into not doing their homework.

[3] In speaking of "*a* proximate causal connection between the unseaworthiness and the injury," [emphasis ours] the court gave a single, and very clear, example—an unseaworthy "slippery top deck, but the plaintiff fell in the engine room." We might suggest that the legalese "proximate' is a word not too helpful to a lay jury, and might well be avoided altogether, but it can do no harm so long as the meaning appropriate to the case is articulated. Where, as in the case at bar, the charge includes an instruction to reduce the verdict by the proportion, if any, that plaintiff's negligence contributed, the articulation is apparent.

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 74-1143.

HANS PEYMANN,
PLAINTIFF, APPELLANT,

v.

PERINI CORPORATION,
DEFENDANT, APPELLEE.

ORDER OF COURT

Entered December 24, 1974

It is ordered that the petition for rehearing filed December 9, 1974, be, and the same hereby is, denied.

By the Court:
/s/ DANA H. GALLUP
Clerk.

Appendix E.

GENERAL DOCKET.
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CASE No. 74-1143.

HANS PEYMANN V. PERINI CORPORATION

DATE	FILINGS—PROCEEDINGS
1974	
Apr. 22	Record on appeal in one volume filed and case docketed.
Apr. 23	Appearance of James C. Gahan filed for appellee.
Apr. 24	Appearance of Kaplan, Esq. for Appellant filed.
May 21	Motion filed. Order (Coffin, Ch. J.) enlarging time for filing statement and designation to June 10, 1974 and enlarging time for filing brief for appellant and appendix to brief to July 10, 1974. Notices to counsel.
May 29	Supplement to record on appeal consisting of four volumes of transcript filed.
June 11	Supplement to record on appeal consisting of certain exhibits filed.
June 14	Motion filed. Order (Coffin, Ch. J.) enlarging time for filing statement and designation to July 10, 1974, and enlarging time for filing brief for appellant and appendix to brief to July 31, 1974. Notices mailed.
June 28	Supplement to record on appeal consisting of one volume of transcript filed.
July 8	Motion filed. Order (Campbell, J.) enlarging time for filing appellant's statement and designation to July 17, 1974; and further enlarging

time for filing brief for appellant and appendix to brief to August 7, 1974. Notices to counsel.

July 16 Motion filed. Order (McEntee, J.) denying appellee's motion for enlargement of time for filing appellee's brief without prejudice. Notices to counsel.

July 17 Motion filed. Order (McEntee J.) enlarging time for appellant to file designation and statement of issues to and including July 24, 1974 and enlarging time for filing brief and appendix to August 14, 1974. Notices mailed.

July 24 Statement and designation filed.

Aug. 1 Supplement to record on appeal consisting of one volume of transcript filed.

Aug. 9 Motion filed. Order (Campbell, J.) granting leave to proceed upon original exhibits as certified by the district court without reproduction. Notices to counsel.

Aug. 12 Motion filed. Order (Caffrey, J.) enlarging time to file appellee's counter designation to and including September 13, 1974. Notices mailed.

Aug. 14 Brief for appellant filed and appendix filed. (4 copies)

Aug. 29 Motion filed. Order (Coffin, Ch. J.) enlarging time for filing brief for appellee to September 30, 1974, and directing case remain on the October list. Notices mailed.

Oct. 1 Brief for appellee and supplemental appendix filed.

Oct. 4 Reply brief for Appellant filed.

Oct. 8 Heard before Aldrich, McEntee & Campbell.

Nov. 22 Judgment: The orders of the District Court are affirmed. Opinion by Aldrich, Senior Circuit Judge. Notices mailed.

Nov. 27 Bill of costs filed.

Dec. 9 Petition for rehearing in banc filed by leave of Court (Aldrich, J).

Dec. 12 Plaintiff Appellant's Notice of Opposition to Allowance of Appellee's Bill of costs and Affidavit in support thereof filed.

Dec. 24 Order (Aldrich, McEntee and Campbell, JJ.) denying petition for rehearing. Opinion by Aldrich, Senior Circuit Judge. Notices mailed.

Dec. 26 Memorandum and Order, order (Aldrich, McEntee and Campbell, J.) denied appellants motion to deny appellee costs. Notices mailed.

1975

Jan. 15 Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed.

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45 U.S.C. § 54 (1970)	3, 6

Supreme Court of the United States.

OCTOBER TERM, 1974.

No. 74-1036.

HANS PEYMANN,
PETITIONER,
v.
PERINI CORPORATION,
RESPONDENT.

Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari and Brief in Support Thereof.

The respondent respectfully maintains that the petitioner's request that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review the judgment of that Court in the above-entitled action should be denied and in support thereof sets forth the following:

I.

Opinion Below.

In addition to the opinion of November 22, 1974 of the United States Court of Appeals for the First Circuit (Appendix A in the petitioner's brief), the respondent respectfully directs the Court's attention to the decision of said

Court of Appeals on December 24, 1974, which was in response to the petitioner's Petition for Rehearing (Appendix C in the petitioner's brief).

II.

Jurisdiction.

The respondent respectfully submits that the criteria for granting a writ of certiorari as set forth in Rule 19 of the Rules of the Supreme Court of the United States are not applicable to the decisions of the United States Court of Appeals for the First Circuit, in the instant case, set out as Appendices A and C in the petitioner's brief. Said decisions are not in conflict with the decision of another court of appeals on the same matter nor have said decisions conflicted with applicable decisions of this Court.

III.

Questions Presented.

The respondent does not agree that the questions presented are correctly stated in Section III of the petitioner's brief and submits that the questions should be:

A. Whether the United States Court of Appeals for the First Circuit was correct in affirming the doctrine that, whereas not every breach of duty will assign a seaman full responsibility for his injury, nevertheless a seaman may not recover where his breach of duty is the *sole* cause of his injury?

B. Whether the United States Court of Appeals for the First Circuit was correct in ruling that, on the basis of the pleadings filed in behalf of the petitioner and the concession by counsel for the petitioner that the same allegations were

relied upon to establish Jones Act negligence and unseaworthiness under general maritime law, it was appropriate for the trial court to submit the case to the jury under the second count for alleged unseaworthiness?

IV.

Statutes Involved.

The respondent at no time raised as an issue the doctrine of assumption of the risk and respectfully contends that the petitioner's assertion that this litigation involved the statute designated as 45 U.S.C. § 54 (1970) is incorrect.

V.

Statement of Facts.

Counsel for the respondent agrees with the first two paragraphs of the statement of facts in the petitioner's brief but respectfully submits that the remaining paragraphs do not accurately set forth the evidence germane to the issues involved. Therefore, the following statement of facts is respectfully submitted in lieu of the balance of the petitioner's statement.

On Wednesday, April 10, 1968, the tugboat "Gorham Whitney" was tied up to a dock undergoing repairs. The overhaul work was being performed in the engine room of the tugboat "Gorham Whitney" while it was at a dock in the employer's yard and while it was out of service.

The petitioner was the chief marine engineer in charge of the engine overhaul work being performed by him and Mr. Mahoney, the assistant engineer.

The petitioner, as the senior or chief marine engineer in charge of the engine room, the overhaul work and the equipment involved in the engine repair, admitted responsibility

for maintaining proper working conditions, and also admitted that it was his job to keep the railings, on which he was allegedly standing, clean of oil.

The petitioner further admitted that it was his duty and responsibility as chief engineer to see to it that the necessary tools and equipment for this engine room repair work were available and in safe working order and that the safety rail in the engine room was kept clean of oil.

The petitioner also admitted that he was the man in charge of the stepladder that should be in the engine room.

The petitioner's fellow employee, Mr. Mahoney, who was working with and under the supervision of the petitioner at the time of the alleged fall, stated that the petitioner was in charge of seeing (1) that the two of them had the necessary tools, equipment and appliances to do the repair work on April 10, 1968; (2) that the equipment they were going to use was available and in good condition; and (3) that the conditions under which they were going to work were safe.

Although there was no third man present in the engine room during the prolonged layover for overhaul, the evidence established that such a procedure was adopted only when there was a emergency at sea or a rush repair job in progress.

On or about April 10, 1968, the petitioner, instead of using a stepladder in the course of his work, allegedly climbed on a railing, which was installed as a safety grab rail in heavy seas, and while on this rail slipped and fell.

There was no evidence in this case as to how or when the alleged oil appeared on the railing and, in addition, the petitioner's fellow workman made it very clear that the rail was not to be used as a stepladder but was installed in the engine room to serve as a safety grab rail in rough seas.

Mr. Mahoney, who was put on the witness stand by the petitioner's attorney, stated he had no recollection of seeing the petitioner fall, although they were no more than two or three feet apart. In addition, this same fellow employee indicated that he had, on many occasions, performed the same type of repair work without assistance.

VI.

History of Proceedings.

The respondent does not agree with the second sentence in the last paragraph of this section of the petitioner's brief and respectfully submits that the decision of the United States Court of Appeals for the First Circuit on the petition for rehearing (Appendix C of the petitioner's brief) is strong support for the respondent's contention that the petitioner has incorrectly set out the questions involved in this controversy.

VII.

Considerations Governing Review on Certiorari.

The respondent, in Section II of this brief, indicated that it disagreed with the petitioner's argument that the discretionary power of the Court should be exercised in its favor. Counsel for the respondent maintains that a review of the language in the two decisions under consideration establishes that they do not come within the provisions of the criteria of Rule 19 of the Rules of the Supreme Court of the United States.

The mere fact that courts in various jurisdictions have or have not denied recovery to an injured seaman in situations alleged to be analagous to the factual situation in the case of *Walker* v. *Lykes Bros. S.S. Co.*, 193 F. 2d 772 (2d

Cir. 1952), does not prove that the decisions rendered by the United States Court of Appeals for the First Circuit are in conflict with decisions of other courts.

VIII.

Argument.

The respondent maintains that the contention of the petitioner that the "Walker Doctrine" is tantamount to a reassertion of the defense of assumption of the risk and therefore violative of 45 U.S.C. § 54 (1970) and case law construing said statute is without merit and offers in support of its position the language of Circuit Judge John Harlan in *Dixon* v. *United States,* 219 F. 2d 10 (2d Cir. 1955):

> "Cases such as *Walker* v. *Lykes Bros. S.S. Co.,* 2 Cir., 1952, 193 F. 2d 772 . . . and other cases of the same tenor which the appellant cites, *are in no way inconsistent with the rule that assumption of risk is not a defense* or comparable to the situation before us. Those cases are only instances of the *firmly established rule that an employee may not recover against his employer for injuries occasioned by his own neglect of some independent duty arising out of the employer-employee relationship.* Their result turns really not upon any question of 'proximate cause,' 'assumption of risk' or 'contributory negligence,' but rather upon the employer's independent right to recover against the employee for the nonperformance of a duty resulting in damage to the employer, which in effect offsets the employee's right to recover against the employer for failure to provide a safe place to work." (Emphasis supplied.) (219 F. 2d at 16-17.)

Inasmuch as the petitioner on page 25 of his brief agrees that it is a proper legal conclusion "to hold that a plaintiff is barred from recovery because his own negligence was the sole cause of injury," counsel for the respondent does not comprehend the petitioner's dissatisfaction with the charge by the trial judge that the respondent could not rely on any principle of assumption of the risk and had the burden of proving that the petitioner's injury was due wholly and solely to a failure on his part to perform the responsibilities assigned to him. (Pages 33 and 34 of petitioner's brief.)

The petitioner, in Section B of its "Argument" (Page 25 of Petitioner's brief), claimed that the United States Court of Appeals for the First Circuit erred in ruling that proof of unseaworthiness was a necessary element of the claim for negligence under the Jones Act. A review of the two decisions (Appendices A and C to petitioner's brief) clearly indicates that the petitioner's interpretation or description of the aforementioned ruling is incorrect. The trial court and the Court of Appeals for the First Circuit made a ruling and two decisions based on the factual situation in this matter. In this case the petitioner alleged and his counsel agreed that the evidence introduced sought recovery under either count I. (Jones Act) and/or count II. (general maritime law) for the same negligent acts. This factual situation, therefore, is not similar to those cases where the alleged negligence of the respondent is based on one set of charges and the unseaworthy condition is based on a different set of circumstances.

It is to be noted that the petitioner's counsel on page 27 of his brief states: "It is also settled that the same set of facts can constitute negligence as well as unseaworthiness."

In such a factual situation, the rulings by the trial court and the decisions by the United States Court of Appeals for the First Circuit cannot be held to be in error.

IX.

Conclusion.

Counsel for the respondent respectfully submits that the record in this litigation does not support the contention of the petitioner that the defense of assumption of the risk is being reinstated and the respondent's burden of proof of negligence under the Jones Act is being increased. Therefore, the respondent asks that the petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit be denied.

Respectfully submitted,

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